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83-1403

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STEPHEN M. KARADOVICH
and
TAMMY R. HARMS,
Petitioners,

versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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February 13, 1984

QUESTION PRESENTED FOR REVIEW

DOES THIS COURT'S HOLDING IN KATZ v. U.S. REQUIRE A WARRANT FOR A CONSTITUTIONALLY PERMISSIBLE SEARCH OF SECLUDED RURAL PROPERTY WHERE A REASONABLE EXPECTATION OF PRIVACY HAS BEEN SHOWN TO EXIST ASSUMING ARGUENDO THE SEIZURE DOES NOT INVOLVE AN INTRUSION BY OFFICERS ONTO THE CURTILAGE?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the instant proceeding, however, this is a companion case which arose out of the identical facts as another Application for Certiorari filed in this Court. That case is LOGIUDICE v. GEORGIA. The LoGiudice decision in the Georgia Court of Appeals is reported at 164 Ga. App. 709, 297 S.E.2d 499 (1982). The Georgia Supreme Court's order vacating certiorari previously granted in LoGiudice is reported at 309 S.E.2d 355 (1983).

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW..... i

DOES THIS COURT'S HOLDING IN KATZ v. U.S. REQUIRE A WARRANT FOR A CONSTITUTIONALLY PERMISSIBLE SEARCH OF SECLUDED RURAL PROPERTY WHERE A REASONABLE EXPECTATION OF PRIVACY HAS BEEN SHOWN TO EXIST ASSUMING ARGUENDO THE SEIZURE DOES NOT INVOLVE AN INTRUSION BY OFFICERS ONTO THE CURTILAGE?

PARTIES TO THE PROCEEDING..... ii

OPINIONS BELOW..... 2

JURISDICTION..... 3

CONSTITUTIONAL PROVISION INVOLVED.. 4

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT..... 10

THE DECISION OF THE GEORGIA SUPREME COURT CONFLICTS WITH THOSE OF OTHER STATE COURTS OF LAST RESORT INVOLVING THE QUESTION OF WHETHER THE PER SE "OPEN FIELDS" EXCEPTION TO THE WARRANT REQUIREMENT FASHIONED FROM THIS COURT'S DECISIONS IN HESTER v. U.S. AND OLMSTEAD v. U.S. IS INCONSISTENT WITH THIS COURT'S SUBSEQUENT DECISION IN KATZ v.

TABLE OF CONTENTS - CONTINUED

Page

U.S.. THE QUESTION HAS NOT BEEN SETTLED BY THIS COURT.

CONCLUSION..... 22

CERTIFICATE OF SERVICE..... 25

TABLE OF AUTHORITIES

Cases:

BROOKS v. STATE,
140 Ga. App. 371, 231 S.E.2d 138 (1976)..... 13

FLORIDA v. BRADY,
406 So.2d 1093 (Fla. Sup. Ct. 1981) (Cert. Granted)
456 U.S. 988..... 18

GIDDENS v. STATE,
156 Ga. App. 258 (1980)..... 15

HESTER v. U.S.,
256 U.S. 57 (1924)..... 15

KARLOVICH et al. v. STATE,
165 Ga. App. 761, 302 S.E.2d 396 (1983) (Cert. vacated without op). 12

KATZ v. U.S.,
389 U.S. 347 (1967)..... 14

LOUISIANA v. BYERS,
359 So.2d 84 (La. Sup. Ct. 1978).. 15

TABLE OF AUTHORITIES - CONTINUED

Page

LOGIUDICE v. STATE,
164 Ga. App. 709, 297 S.E.2d 499 (1982) (Cert. Vacated)
309 S.E.2d 354..... ii,9

MAINE v. THORNTON,
453 A.2d 489 (Me. Sup. Jud. Ct. 1982) (Cert. Granted)
103 S.Ct. 1520..... 19

McGEE v. STATE,
133 Ga. App. 184, 210 S.E.2d 355 (1974)..... 13

NORMAN v. STATE,
134 Ga. App. 767, 216 S.E.2d 644 (1975)..... 13

OLMSTEAD v. U.S.,
277 U.S. 438 (1928)..... 15

TENNESSEE v. LAKIN,
588 S.W.2d 544 (Tenn. Sup. Ct. 1979)..... 17

TENNESSEE v. WERT,
550 S.W.2d 1 (Tenn. Crim. 1977) (Cert. Denied)..... 16

U.S. v. OLIVER,
686 F.2d 356 (6th Cir. 1982) (en banc), (Cert. Granted)
103 S.Ct. 812 (1983)..... 20

TABLE OF AUTHORITIES - CONTINUED

Page

WALKER v. STATE,
140 Ga. App. 418, 231 S.E.2d 386
(1976)..... 13

Statutes:

28 U.S.C. §1257(3)..... 3

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IN THE

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versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

STEPHEN M. KARLOVICH and TAMMY R. HARMS pray that a Writ of Certiorari issue to the Georgia Court of Appeals to review the decision of the Georgia Supreme Court dated and entered December 15, 1983, (Case No. 39835) denying petitioners' Motion for Rehearing of the

Georgia Supreme Court's previous decision on November 30, 1983, wherein that court vacated as improvidently granted its earlier grant of certiorari on June 8, 1983. Petitioners had asked the Court to review the February 24, 1983, decision of the Georgia Court of Appeals (Case Nos. 65277 & 65278) affirming their marijuana possession convictions and sustaining the denial of their trial Motions to Suppress evidence illegally seized.

OPINIONS BELOW

Neither the decision of the Georgia Supreme Court (Smith, J., dissenting without opinion) dated and entered December 15, 1983, denying petitioners' Motion for Rehearing nor the November 30, 1983, vacation of certiorari was reported and, because of their summary nature, are not reproduced here. The

opinion of the Georgia Court of Appeals entered on February 24, 1983, is reported at 165 Ga. App. 761, 302 S.E.2d 396 (1983).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) which authorizes the grant of the Writ of Certiorari to the highest court of a State in a case where a right, privilege or immunity is specially claimed under the Constitution of the United States. In accordance with Rule 20(1) of this Court, this Application for Certiorari is filed within sixty (60) days of the entry of the Judgement of the Georgia Supreme Court on December 15, 1983, denying the Petitioners' Motion for Rehearing.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In 1979 Thomas LoGuidice purchased a 345 acre tract of rolling, densely wooded land in rural Upson County, Georgia, about eight miles East of Thomaston. (V.II-181,182). In the summer of 1980, Upson County Sheriff Merrill Greathouse received reports that machinery had been heard in operation at night on the LoGiudice property. (V.II-53,54). An unidentified source

told the sheriff in the Fall of that year that LoGiudice had hired a local contractor to dig a well on the land, directed him to lay water pipe from the well a distance into the woods, discharged him, and told him he would finish the job himself. (V.II-26).

Sometime in the fall of 1980 the sheriff climbed barbed wire and welded fences to gain entry and "walked-over" the property searching for marijuana. He found none. (V.II-27,56). Later that fall the sheriff conducted an aerial search of the property but was only able to ascertain the construction of a new fence by LoGiudice around his property. (V.II-26,58,77). The sheriff knew the property belonged to LoGiudice because he had checked the property tax records. (V.II-57).

On July 6, 1981, acting on

unspecified information from an unidentified source, the sheriff and a group of Georgia Bureau of Investigation (G.B.I.) agents entered the property to search for marijuana. (V.II-61,65). The officers took a back route onto the subject property by crossing a creek, climbing a barbed wire fence, and following an old logging road. (V.II-62). They discovered an enclosed one half acre plot of marijuana growing about 35 feet from and, in the sheriff's words, "adjacent to", a small travel trailer in which Tammy Harms, LoGiudice's sister-in-law, was living. (V.II-64,22,66,142). The trailer belonged to LoGiudice and was connected to the patch by a path. (V.II-22,177). It was necessary to come within ten feet of the plot to ascertain its contents because of a tall chicken wire fence

surrounding it. (V.II-22,66,67,142). The plot was about 300 feet from the nearest property line and was not visible beyond the LoGiudice property boundaries. (V.II-78, 142). The officers watched the plot for four and one half to six hours and saw Ms. Harms come into the enclosure and "fondle" the plants. No arrests were made that day. (V.II-27,67).

On July 7, 1981, the officers returned to the property and arrested Ms. Harms and Stephen Karlovich on or near the plot. (V.II-31). The sheriff then left, drove into Thomaston and procurred a search warrant. (V.II-31,59). As he was leaving the property, the sheriff, for the first time, he said, noticed that one of the two locked gates blocking the private access road leading onto the property was posted with a "no

trespassing" sign. (V.II-21,59). The realtor who had handled the sale of the property to LoGiudice testified that the property was fenced and posted when LoGiudice purchased it in 1979. (V.II-181,182).

LoGiudice, Harms and Karlovich were separately indicted and all three filed Motions to Suppress in the trial court. The motions were denied and the three were convicted by a bench trial on September 2, 1981. (V.II-187; T.-1 to 10; V.I-1 to 34). The transcript of the separate LoGiudice suppression hearing was incorporated by stipulation into these petitioners' record. (T.-3).

The Georgia Court of Appeals consolidated the Harms and Karlovich cases, reviewed the convictions and the denials of their motions to suppress and affirmed the actions of the trial court.

The court ruled that the area searched was not within the curtilage of Ms. Harms' dwelling but an "open field" and therefore not subject to the warrant requirement of the 4th Amendment. The opinion went on to conclude that as neither Karlovich nor Harms owned the property they lacked standing to complain. 165 Ga. App. at 762, 763. A different panel of the Court of Appeals found LoGiudice lacked standing because he did not reside in the trailer but elsewhere on the property and it was "possible" the marijuana patch was not within the curtilage of the Harms dwelling. 164 Ga. App. at 710. The Georgia Supreme Court initially denied, then granted certiorari, heard oral arguments and received briefs, then vacated certiorari in both cases. Justice Smith issued a strongly worded

dissent to the LoGiudice order vacating certiorari and dissented without opinion in the Karlovich and Harms decision. Justice Smith's dissent is reported at 309 S.E.2d at 355 to 362, and is reproduced and appended to LoGiudice's petition for certiorari which has been filed with this Court.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE GEORGIA SUPREME COURT CONFLICTS WITH THOSE OF OTHER STATE COURTS OF LAST RESORT INVOLVING THE QUESTION OF WHETHER THE PER SE "OPEN FIELDS" EXCEPTION TO THE WARRANT REQUIREMENT FASHIONED FROM THIS COURT'S DECISIONS IN HESTER v. U.S. AND OLMSTEAD v. U.S. IS INCONSISTANT WITH THIS COURT'S SUBSEQUENT DECISION IN KATZ v. U.S.. THE QUESTION HAS NOT BEEN SETTLED BY THIS COURT.

The Georgia Supreme Court, by declining to review the February 24, 1983, decision of the Georgia Court of Appeals, endorsed the analysis applied by that court. The Court of Appeals focused on the location of the seized substance and the property interests of the petitioners in concluding they had no standing to complain of the search:

> As to Karlovich, the trial court did not err in denying the motion to suppress. He had no standing to question the search of an open field lying on property owned by another and in which he had no proprietary interest. ANDERSON v. STATE, 133 Ga. App. 45, 46(1)(209 S.E.2d 665). See also BRISBANE v. STATE, 233 GA. 339, 345 (211 S.E.2d 294); CUEVAS v. STATE, 151 Ga. App. 605, 610 (260 S.E.2d 737).
>
> Neither did the trial court err as to the denial of the motion by Harms. Though the argument was made that the marijuana was only 35 feet from the trailer occupied by Ms. Harms and thus arguably was within

the curtilage of her home, the facts clearly show to the contrary. The field was separated from her residence as surely as from that of LoGiudice (1,700 feet). The curtilage pertains to land used as a part of one's home and therefore is under the same protection afforded the homesite by the Fourth Amendment to the Constitution. It is obvious however from the facts that Ms. Harms did not use the marijuana field as a part of her homesite (i.e., as a vegetable or flower garden, for use of pets or her own recreation). This field was separated from her trailer and only part of the trailer was visible from the ten-foot chicken wire fence surrounding the field. In fact the marijuana was not visible to the eye further than ten feet from the field and obversely the inference is reasonably inescapable that one could not see the trailer from within the field. Thus Ms. Harms is faced with the same problem faced by Karlovich. The field was indeed nothing more than that - an open field and not a part of her homesite. She likewise has no standing to controvert the search of an open field owned by another.

KARLOVICH, et al. v. STATE, 165 Ga. App. 761, 762, 763, 302 S.E.2d 396 (1983).

Petitioners do not concede the

patch was without the curtilage of the Harms dwelling. See McGEE v. STATE, 133 Ga. App. 184, 210 S.E.2d 355 (1974) (a shed 45 to 60 feet from house within curtilage); NORMAN v. STATE, 134 Ga. App. 767, 216 S.E.2d 644 (1975) (a truck 200 feet from dwelling held within curtilage); WALKER v. STATE, 140 Ga. App. 418, 231 S.E.2d 386 (1976) (styrofoam cooler 100 yards from house at end of path within curtilage); BROOKS v. STATE, 140 Ga. App. 371, 231 S.E.2d 138 (1976) (presence of path from house gives rise to presumption of control over items at end thereof). However, even assuming arguendo the patch was without the curtilage of the dwelling the Court of Appeals opinion fails to address the principal argument progressed by petitioners that the evidence showed these petitioners had,

"...exhibited an actual (subjective) expectation of privacy and ... that the expectation is one which society is prepared to recognize as reasonable." KATZ v. U.S., 389 U.S. 347, 361 (1967) (Harlan, J. concurring). Rather, the Court of Appeals' analysis in these petitioners' and LoGiudice's cases conclude with its determination that the patch was not within the curtilage of the petitioners' respective dwellings. The Georgia courts have apparently concluded that, at least in the case of rural property, there can never be a reasonable expectation of privacy such as to necessitate the procurement of a warrant before a valid search of an area outside the curtilage can occur. The Court of Appeals' opinion in the LoGiudice case relies upon this court's decision in HESTER v. U.S., 256 U.S. 57

(1924), in reaching its conclusion. This court's decisions in HESTER and OLMSTEAD v. U.S., 277 U.S. 438 (1928), form the basis for what has come to be known as the "open fields" exception to the warrant requirement. See GIDDENS v. STATE, 156 Ga. App. 258, 259 (1980).

Courts of Last Resort in other states have sharply departed from the reasoning adopted by the Georgia courts.

In LOUISIANA v. BYERS, 359 So.2d 84 (La. Sup. Ct. 1978), a case involving facts similar to those in the case at bar, the court invalidated a warrantless search of a 640 acre tract of land to observe a plot of growing marijuana. There the court found:

> In the present case the marijuana was not visible from the public road. The posted signs announced that the logging road was private and prohibited entry of the land. A

> chain barred access to the private road, though it was down at the time of arrest and seizure. We conclude under these circumstances, the defendants had a legitimate expectation of privacy.

BYERS, 359 So.2d 84.

In TENNESSEE v. WERT, 550 S.W.2d 1 (Tenn. Crim. 1977) (Cert. Denied), the Tennessee Court of Criminal Appeals held that where the defendant's 50 acre farm was enclosed by a fence, with the exception of about 400 feet fronting a road, and police, acting on information from informers, entered the farm from a wooded area near the road and found a marijuana patch, the warrantless search violated both Federal and State Constitutions despite the State's contention that since the marijuana patch was found in the open fields of the farm, it was an area unprotected by the Fourth Amendment's guarantees

against unreasonable searches and seizures. In TENNESSEE v. LAKIN, 588 S.W.2d 544 (Tenn. Sup. Ct. 1979), warrantless officers, acting on an informer's tip, walked about one fourth of a mile onto the defendant's property to observe marijuana growing. The opinion does not indicate whether, as here, the property was posted, fenced or locked down. Although the court noted, "[p]robably the area in which the marijuana was found was outside the 'curtilage' of the residence as that term is usually understood..."[588 S.W.2d at 547], it nevertheless concluded:

> Ordinarily officers searching occupied, fenced, private property must first obtain consent or a warrant; otherwise they proceed at the risk that evidence obtained may be suppressed. When a warrantless search is challenged, an exception

> to the warrant requirement must be shown.

LAKIN, 588 S.W.2d at 549.

In FLORIDA v. BRADY, 406 So.2d 1093 (Fla. Sup. Ct. 1981), officers used a vehicle to crash through a locked gate to gain access to a 1800 acre tract of posted and fenced property. The case was decided adversely to the State in the Florida Supreme Court and certiorari to this Court was sought. Certiorari was granted by this court at 456 U.S. 988 (No. 81-1636) and the case is currently awaiting decision. In its opinion the Florida Supreme Court stated:

> Although the HESTER doctrine has not been overuled, subsequent opinions indicate that the open fields doctrine cannot be used as a carte blanche for a warrantless search simply because the location is not part of a dwelling or its adjacent curtilage. As the court later observed in its opinion in

> KATZ v. U.S., [cits ommited] ... 'the Fourth Amendment protects people not places'. ... Our opinion in NORMAN [v. STATE, 379 So.2d 643 (Fla. Sup. Ct. 1980)], made it clear that fences and locked gates are evidence of the owner's or possessor's expectation of privacy. (Emphasis Added)

BRADY, 406 So.2d at 1095, 1096.

The Maine Supreme Judicial Court, in MAINE v. THORNTON, 453 A.2d 489 (Me. Sup. Jud. Ct. 1982), reviewed a warrantless search for marijuana on a large tract of heavilly wooded property. There, as here, the marijuana was not visible from outside the property boundaries. The property was bounded by an old stone wall and barbed wire and posted with "No Trespassing" signs. The Maine Court found a reasonable expectation of privacy to exist and suppressed the evidence. THORNTON too has been granted certiorari by this

Court. The grant is reported at 75 L.Ed.2d 944, 103 S.Ct. 1520 (No. 82-1273).

BRADY and THORNTON, supra, have been consolidated for review in this Court with a case from the Federal 6th Circuit Court of Appeals, U.S. v. OLIVER, 686 F.2d 356 (6th Cir. 1982) (en banc), Cert. Granted 103 S.Ct. 812 (1983). OLIVER also involved the warrantless search of a large wooded, posted and fenced tract of land on which a plot of marijuana was growing. The case was initially decided by the Court of Appeals in favor of the defendant but on rehearing issued an en banc 5 to 4 decision adverse to Oliver. The opinion strongly suggests its decision might have been different had, as here, there been persons living in the area adjacent to the marijuana. OLIVER, 686 F.2d at

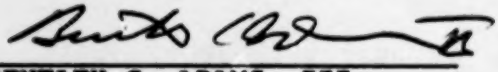
360. Judge Keith issued a forceful dissent for the OLIVER minority which appears at 686 F.2d 361 to 373. This Court has indicated its consideration of OLIVER will center on whether the Open Fields doctrine developed from HESTER, supra, has been modified by the holding in KATZ, supra.

CONCLUSION

The Georgia Supreme Court's failure to grant review of the Georgia Court of Appeals' decision in this case leaves standing a decision which applies a rigid locational approach to the resolution of 4th Amendment questions at least with respect to warrantless searches of large tracts of private property. That view holds that unless the area searched is within the curtilage of a dwelling, there is no warrant required for a search thereof. This view is in total disharmony with the decisions of several other states' courts of last resort in cases involving facts substantially similar to the instant matter. Those decisions have focused upon the question of whether a reasonable expectation of privacy has been shown to exist in the area

searched. Under these holdings the proximity of the area searched to a dwelling and its surrounding curtilage may be considered in evaluating whether a reasonable expectation of privacy has been shown to exist. Such decisions recognize there are quite often no 4th Amendment protections for activities conducted beyond the dwelling and its curtilage, but they do not ignore the possibility that where the occupiers of such an area have taken substantial steps to exclude the public, a reasonable expectation of privacy and, hence, Fourth Amendment protections may exist. Because of the obvious lack of consistancy now existing between the Georgia courts and other state courts of last resort and because this Court has granted review in the factually similar OLIVER, BRADY and THORNTON cases, the

grant of the writ is particularly appropriate in this instance. Certiorari should be granted and the case set for full briefing and oral argument.



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CERTIFICATE OF SERVICE

This is to certify that I have this date served one copy of the within and foregoing Petition for Writ of Certtiorari upon the Georgia Attorney General, Georgia Department of Law, Room 132, Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334 and upon the District Attorney for the Griffin Judicial Circuit, 2nd Floor, Upson County Courthouse Annex, Thomaston, Georgia 30286 by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This 13th day of February, 1984.

BENTLEY C. ADAMS, III

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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February 20, 1984

TABLE OF CONTENTS

Page

November 16, 1983 Order of the Georgia Supreme Court Vacating Certiorari With Dissenting Opinion by Justice George T. Smith in the Case of THOMAS F. LOGIUDICE v. THE STATE OF GEORGIA..... 1a

February 24, 1983 Decision of the Georgia Court of Appeals Affirming the Trial Court's Decision in the Case of STEPHEN M. KARLOVICH and TAMMY R. HARMS v. THE STATE OF GEORGIA..... 41a

November 22, 1982 Decision of the Georgia Court of Appeals Affirming the Trial Court's Decision in the Case of THOMAS F. LOGIUDICE v. THE STATE OF GEORGIA..... 46a

March 14, 1983 Order of the Georgia Court of Appeals Denying Appellants' Motion for Rehearing in the Case of STEPHEN M. KARLOVICH and TAMMY R. HARMS v. THE STATE OF GEORGIA..... 55a

June 8, 1983 Order of the Georgia Supreme Court Granting Certiorari in the Case of STEPHEN M. KARLOVICH and TAMMY R. HARMS v. THE STATE OF GEORGIA..... 56a

TABLE OF CONTENTS - CONTINUED

Page

November 30, 1983, Order of the Georgia Supreme Court Vacating Certiorari in the Case of STEPHEN M. KARLOVICH and TAMMY R. HARMS v. THE STATE OF GEORGIA..... 57a

December 15, 1983 Order of the Georgia Supreme Court Denying Petitioners' Motion for Rehearing in the Case of STEPHEN M. KARLOVICH and TAMMY R. HARMS v. THE STATE OF GEORGIA..... 58a

February 15, 1984, Letter to Counsel From Clerk of the Georgia Court of Appeals Notifying of Stay of Mandate in the Case of STEPHEN M. KARLOVICH v. THE STATE OF GEORGIA..... 58a

IN THE SUPREME COURT OF GEORGIA

Decided: November 16, 1983

39491. LoGIUDICE v. THE STATE

PER CURIAM.

After plenary consideration of this matter, it is found not to satisfy the criteria for the grant of certiorari and the writ is therefore vacated.

All the Justices concur; except Smith, J., dissenting.

SMITH, Justice.

I dissent from the court's dismissal of the grant of certiorari in this case. We granted certiorari to consider an important Fourth Amendment question: Whether the decision in KATZ v. UNITED STATES, 389 U.S. 347 (88 SC 507, 19 LE2d 576) (1967), modified the "open fields" doctrine first announced in HESTER v. UNITED STATES, 265 U.S.

57 (44 SC 445, 68 LE 898) (1924), to require a warrant for the search of a secluded field when a reasonable expectation of privacy can be shown to exist in that field. I believe that it did and, accordingly, would reverse.

Appellant Thomas LoGiudice was charged with possession of marijuana with intent to distribute in violation of OCGA §16-13-30. Prior to trial, he filed a motion to suppress which was denied, following a hearing, by the trial court. Appellant was convicted after a bench trial. On appeal, the Court of Appeals affirmed. LOGIUDICE v. STATE, 164 Ga. App. 709 (297 SE2d 499) (1982).

In 1979 appellant purchased a 345-acre tract of land bordering on Georgia Highway 74 in Upson County, eight miles east of Thomaston. In the

summer of 1980, Upson County Sheriff Merrill Greathouse began receiving reports of activity on appellant's land. Bully McDaniel, owner of a package store located on Highway 74 near the property, told the sheriff he had heard heavy earth-moving equipment operating late at night on the land. An unidentified source reported that in the fall of 1980 appellant hired a local contractor to dig a well on the land, directed him to lay water pipe from the well some 300 yards through heavy woods, and then discharged him, explaining that he would complete the job himself.

Based on this information Sheriff Greathouse[1] entered appellant's land sometime in the fall of 1980 to search for illegal marijuana plants. At the hearing on appellant's

motion to suppress, the sheriff admitted climbing both barbed wire and welded fences when entering appellant's property on this occasion. He searched the area surrounding appellant's trailer but found no marijuana. Later that fall, Sheriff Greathouse conducted an aerial search of appellant's land. He was again unable to detect any illegal activity, but noticed that appellant was constructing a new fence around his land.

On July 6, 1981, acting on a tip from an unidentified source, the sheriff and several Georgia Bureau of Investigation agents again entered appellant's land without a warrant to search for marijuana. According to Sheriff Greathouse, the group entered by a back route by crossing a creek, climbing a barbed wire fence, and fol-

lowing an old logging road some 200 yards until they reached a clearing. There they discovered a half-acre field of marijuana. The plants were surrounded by dense chicken-wire fencing material and were visible only from a distance of ten feet or less. A 35-foot path led from the field through dense undergrowth to a travel trailer owned by appellant and occupied by Tammy Harms. The officers conducted a "stake-out" of the field, remaining there for four and one-half to six hours. While there they observed Ms. Harms come onto the field and "fondle" the marijuana plants. No arrests were made at this time. The officers returned to the field on the morning of July 7, 1981 and observed appellant, Ms. Harms and Stephen Karlovich on the field. A search war-

rant was obtained,[2] and appellant, Harms and Karlovich were arrested.[3]

Evidence introduced at the suppression hearing showed that the front entrance to LoGiudice's land was guarded by two locked, welded iron gates and posted with "no trespassing" signs; that the marijuana field was not visible from adjoining property or any public road, and was located 300 feet from appellant's nearest boundary line; that Sheriff Greathouse, while disclaiming prior knowledge of any "no trespassing" signs, was fully aware that he had climbed a fence or fences and entered appellant's land without his permission.[4]

The Court of Appeals, citing GIDDENS v. STATE, 156 Ga. App. 258 (274 SE2d 595) (1980), affirmed the trial court's denial of appellant's

motion to suppress. In so doing, the court relied on the "open fields" doctrine of HESTER v. U.S., supra. In Hester, federal revenue agents with prior information that Hester was trafficking in illegal moonshine whiskey hid near Hester's residence and observed him come out of the house and hand one Henderson a bottle of moonshine. The agents sounded an alarm. Hester grabbed a gallon jug from a nearby automobile, and he and Henderson fled on foot across a field, with the officers in pursuit. In their haste to escape the two suspects dropped the containers, which broke and were later determined to have contained illegal moonshine. On appeal of the trial court's refusal to suppress the agents' testimony concerning what had transpired in the field, the Supreme

Court rejected Hester's Fourth Amendment claim. In a short opinion, Justice Holmes wrote for a unanimous Court that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law.[5]

In the sixty years since the decision in Hester, courts have, based on the above language, fashioned an exception to the Fourth Amendment's warrant requirement known as the "open fields" doctrine. Simply stated, that doctrine holds that the Constitution's protection of "persons, houses, papers and effects" does not extend to activities conducted in any area beyond the curtilage of a home. See

UNITED STATES v. OLIVER, 686 F2d 356, 363 (6th Cir. 1982) (Keith, J., dissenting). The Court of Appeals has consistently applied a per se rule upholding warrantless searches which were conducted in areas outside a dwelling place or its curtilage. See, e.g., OLSON v. STATE, 166 Ga. App. 104 (303 SE2d 309) (1983); GIDDENS v. STATE, supra; QUARLES v. STATE, 142 Ga. App. 394 (236 SE2d 139) (1977); PATTERAON v. STATE, 133 Ga. App. 742 (213 SE2d 31) (1975).

Based on these authorities, the state argues that a warrantless search of land beyond the curtilage can never violate the Fourth Amendment. This position - which amounts to an assertion that he "open fields" doctrine may be used as carte blanche for warrantless searches of areas outside the

curtilage - is simple untenable. Close ananlysis of the Hester decision and subsequent developments in Fourth Amendment law demonstrate that the "open fields" doctrine does not apply to this case.

Hester was decided in 1924, prior to application of the Fourth Amendment to the states, MAPP v. OHIO, 367 U.S. 643 (81 SC 1278, 61 LE2d 575) (1961), and before the advent of modern Fourth Amendment theory as exemplified by KATZ v. U.S., 389 U.S. 347 (88 SC 507, 19 LE2d 576) (1967). The Hester decision also predated the development of the "exigent circumstances" doctrine, see MCDONALD v. U.S., 335 U.S. 451 (69 SC 191, 93 LE 153 (1948), the "hot pursuit" doctrine, see WARDEN v. HAYDEN, 387 U.S. 294 (91 SC 1642, 18 LE2d 782) (1967),

and the "plain view" doctrine, see COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (91 SC 2022, 29 LE2d 564) (1971). Were Hester not on the books and if the same factual situation arose today, no court would need to create a special "open fields" exception to the Fourth Amendment. Today the case would turn on the doctrine of hot pursuit. Hester and his accomplice committed a crime in plain view of police who were legally in place. Based on the hot pursuit and exigent circumstances doctrines, the police could lawfully pursue and arrest the defendants. Any expectation of privacy possessed by Hester had evaporated, since police had probable cause to follow and arrest, either in the open fields or the house, as a crime was committed in plain view and the officers were lo-

cated in a place they had a legal right to be. See U.S. v. SANTANA, 427 U.S. 38 (96 SC 2406, 49 LE2d 300) (1976), WARDEN v. HAYDEN, supra. Moreover, the oft-quoted "open fields" language of Hester was unnecessary to the Court's decision in that case. Central to the Court's analysis was its observation that the moonshine containers had been abandoned by the defendants prior to their inspection by revenue agents, so that the defendants could not complain of a search of the abandoned property. "The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle - and there was not [a] seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." 265 U.S. at 58. For these reasons, it is

unwise to rely on the outdated Hester decision in support of a sweeping "open fields" exception to the Fourth Amendment.[6]

Cases decided since HESTER v. U.S. provide support for this position. In KATZ v. U.S., 389 U.S. 347 (88 SC 507, 19 LE2d 576) (1967), the Court retreated from the "constitutionally protected area" analysis of Fourth Amendment issues epitomized by the Hester case and OLMSTEAD v. U.S., 277 U.S. 438 (48 SC 564, 72 LE 944) (1928). Instead the Court focused on the individual's reasonable expectation of privacy in a given situation. As the opinion in Katz states: "[T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area' . . . For

the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection. But what he seeks to perserve as private, even in an area accessible to the public, may be constitutionally protected." In his concurrence in Katz, Justice Harlan formulated a test which has become the accepted standard for determining the applicability of the Fourth Amendment to a particular situation: "[T]here is a twofold requirement, first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring). The court has applied

Harlan's test in subsequent decisions. See, e.g., RAKAS v. ILLINOIS, 439 U.S. 128 (99 SC 421, 58 LE2d 387) (1978).

Thus in Katz the Supreme Court for the first time recognized that the Fourth Amendment's protection of "persons, houses, papers, and effects, against unreasonable searches and seizures ..." applies first and foremost to persons, not places. (Emphasis supplied). Since Katz, the Supreme Court has time and time again reaffirmed that it is one's legitimate expectation of privacy, not the particular area searched or seized, which controls. See, e.g., UNITED STATES v. SALVUCCI, 448 U.S. 83 (100 SC 2547, 65 LE2d 619) (1980); RAKAS v. ILLINOIS, supra.[7] The per se "open fields" doctrine, which holds that the Fourth Amendment does not extend to areas

outside a dwelling place or its curtilage, is now unsupportable, particularly in light of recent Supreme Court cases recognizing numerous areas outside the curtilage where one may legitimately expect his privacy to be protected from government intrusion. See REID v. GEORGIA, 448 U.S. 438 (100 SC 2752, 65 LE2d 890) (1980) (airport concourse); YBARRA v. ILLINOIS, 444 U.S. 85 (100 SC 338, 62 LE2d 238) (1979) (tavern interior); MARSHALL v. BARLOW'S INC., 436 U.S. 307 (98 SC 1816, 56 LE2d 305) (1978) (business premises); U.S. v. CHADWICK, 433 U.S. 1 (97 SC 2476, 53 LE2d 538) (1977) (automobile); KATZ v.U.S., supra (telephone booth). See also HAYES v.STATE, 141 Ga. App. 706 (234 SE2d 360) (1977) (apartment of another), BOWERS v. STATE, 151 Ga. App. 46 (258

SE2d 623) (1979).

In the years since Katz, the Supreme Court has not been called upon to address the continuing validily of the Hester decision.[8] The Court has, however, cited Hester in two relatively recent decisions. IN AIR POLLUTION VARIANCE BOARD v.WESTERN ALFALFA CORP., 416 U.S. 861 (94 SC 2114, 40 LE2d 607) (1974), a state health inspector trespassed on the outdoor premises of a business establishment in order to conduct a pollution test of smoke being emitted from the factory's chimneys. Citing the Hester case, the Court held that the warrantless search was permissible, nothing that "the field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded. . . He had sighted

what anyone in the city who was near the plant could see in the sky - plumes of smoke." Id. at 865. I think that the circumstances of Western Alfalfa distinguish it from the present case. There the property in question was easily accessible and open to the public, whereas appellant in this case lhas taken elaborate precautions to exclude the public from his land. Unlike the inspector in Western Alfalfa, Sheriff Greathouse was not in an area accessible to or visible by the public when he made his observations. I agree with the Court in STATE v. THORNTON, 453 A2d 489 (Me. 1982), that the "open fields" doctrine is inapplicable where the observing officer is in a place where he has no right to be when the incriminating observations are made. See also U.S. v. OLIVER, supra; U.S.

v. HOLMES, 521 F2d 859 (5th Cir. 1975). In HARRIS v. U.S., 390 U.S. 234 (88 SC 992, 19 LE2d 1067) (1968), a per curiam opinion, the Court cited Hester in support of the proposition that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Thus it can be seen that the post-Katz Court has narrowed the Hester case to apply only to observations made from a place where the observing officer was legitimately stationed.

The recent case of DOW CHEMICAL CO. v. U.S., 536 FSupp 1355 (E.D.Mich. 1982) is particularly instructive in resolving the issues presented by this appeal. There the Environmental Protection Agency was conducting an in-

vestigation of a 2000-acre Dow manufacturing plan to check for excess pollutant emissions. Following an on-site inspection of the plant, the EPA hired an independant contractor to conduct aerial surveillance and take detailed photographs of the plant without Dow's knowledge. When Dow became aware of the flyover, it sued the EPA, claiming that the agency's warrantless aerial photography of its plant consituted an unreasonable search in violation of the Fourth Amendment. The court agreed, holding that Dow's maintenance of fences, locked gates, and elaborate security systems around its plant manifested its subjective expectation of privacy in the plant. The court continued: "The Fourth Amendment should not be read to require the citizens or busi-

nesses of this nation to take unreasonable measures to protect themselves from surreptitious governmental searches. This court is not prepared to conclude that Dow must build a dome over its entire plant before it can be said to have manifested or exhibited an expectation of privacy." (Emphasis supplied). Id. at 1365. The court concluded that Dow's manifested privacy expectation was one that society was prepared to accept as reasonable, and rejected the EPA's assertion of the "open fields" doctrine as justification for the search. Summary judgment was granted in favor of Dow, and an injunction entered prohibiting the EPA from conducting further aerial surveillance and photography of the Dow plant. See also WHEELER v. STATE, ____ SW2d. _____ (Tex. Ct. Crim. App.,

decided 9/29/83).

In light of these authorities, I would hold that a per se application of the "open fields" doctrine to validate warrantless searches of land beyond the curtilage is unacceptable. Accord, Case Comment, UNITED STATES v. OLIVER, 20 Am. Crim.L.Rev. 485 (1983); Note, How Open Are Open Fields?, 14 U.Tol.L.Rev. 133 (1982). This is not to say that a warrantless search of a field will ordinarily violate the Fourth Amendment. On the contrary, the opposite is true, since "an individual ordinarily has no constitutionally protected right to expect privacy in open fields," CASEY v. STATE, 87 Nev. 413 (488 P2d 546) (1971). I merely conclude, as have many courts, that "Hester no longer has any independant meaning but merely indicates that open

fields are not areas in which one traditionally might reasonably expect privacy," U.S. v. FREIE, 545 F2d 1217 (9th Cir. 1976). See LaFave, Search and Seizure §2.4(a) (1978).

Another way of stating the same conclusion is this: For the "open fields" doctrine to apply, the searched area must truly be "open" - that is, an area in which no one has exhibited a reasonable expectation of privacy. See Case Comment, U.S. v. OLIVER, supra, at 493 (1983). Webster's Third New International Dictionary defines "open" as follows: "[S]o arranged or governed as to permit ingress, egree, or passage. . . having no enclosing or confining barrier. . . free from fences, boundaries, or other restrictive margins." Common sense dictates that a field not meeting this

definition is not "open" for purposes of application of a per se "open fields" exception to the Fourth Amendment. By no stretch of the imagination can appellant's land be characterized as "free from fences, boundaries, or other restrictive margins."

Having rejected the per se approach used by the court below, it remains to answer the question posed by the Katz case: Whether, under these facts, appellant possessed a reasonable expectation of privacy in his fields that was violated by Sheriff Greathouse and the GBI. Katz dictates that we decide, first, whether appellant had an actual, subjective expectation of privacy; and second, whether this expectation is one that society is prepared to recognize as reasonable.

Plainly appellant's actions demonstrated a subjective expectation of privacy in his fields. His land was fenced at all borders, clearly posted "no trespassing," and guarded by two locked gates at the main entrance. The two secluded fields located within appellant's property lines were surrounded by thick forests and undergrowth. Neither field was visible from public roads, neighboring property, or the air. It is difficult to imagine what other precautions appellant could have taken to protect his property against intruders, short of erecting a ten-foot barricade around the land, covering his entire farm with a dome, or posting guards at all borders of his property. Cf. DOW CHEMICAL CO. v. U.S., supra.

The second part of the Katz test

asks whether appellant's expectation of privacy is one that society is prepared to recognize as reasonable. In applying this part of the test, courts have generally found reasonable expectations that are "normally shared by people in that setting" and "fall within the limits of what society can accept given its interest in law enforcement," U.S. v. OLIVER, supra, at 372 (Keith, J., dissenting). The practice of erecting a fence or barricade to maintain privacy on land predates the Fourth Amendment and appears to be nearly as old as civilization itself. Nine hundred years ago, a medieval English landowner whose property was overrun by intruders had to at once assemble an army and retake his property by force. If he failed, the land became the lawful property of the

usurper. See Bracton, On the Laws and Customs of England, Vol. II, p.155 (Thorne ed. 1968). In time, English landowners began to protect their lives and property by building walls around their homes, storage houses and servants' quarters. This was for the purpose of forestalling surprise attacks and to give the defending landowners the advantage when attacked. This protected area, which included the homestead and its immediate surroundings, became known as the "curtilage" at common law. See BARE v. COMMONWEALTH, 122 Va. 783 (94 SE 168) (1917).

In this country, the use of fences and barricades has always played an important part in defining landowners' right to privacy. In the 1800's in the Midwest and West, the

open range was used by everyone. Violence erupted when squatters, farmers and cattle ranchers claimed the same land as their own. By the 1880's, it became a common practice to erect barbed-wire fences at one's claimed property line. See Billington, Westward Expansion, 595-98 (4th Ed. 1974). A landowner's erection of such a fence said, in effect: "This land is mine, I intend to put it to use, and I demand that all respect my ownership and privacy." More recently, enactment of "no fence" laws in this country meant that a landowner no longer had to construct a fence to protect his farmlands and his privacy from another's domestic animals which are left to run free. See 1933 Code of Georgia, § 62-501 et seq.; THOMBLEY v. HIGHTOWER, 52 Ga. App. 716, 719 (184 SE 331)

(1935). The law has evolved through history toward general recognition that an owner of land has a right to use his land as he pleases, free from trespass or intrusion, without having to build a fort around it as in common law days. Appellant's erection of fences, no trespassing signs, and locked gates around his land, then, should be recognized for what it is -- a reasonable and established method of protecting his privacy in the enclosed land. This is particularly true in agricultural states such as Georgia, where one's land is often his only source of livelihood. LoGiudice's expectation of privacy is one that society in general, and Georgia in particular, recognizes as "reasonable."

One commentator has aptly observed that application of the Katz

standard is, at bottom, "a value judgment. It is whether, if the particular form of surveillance practiced by police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 403 (1974).

In my view the Fourth Amendment at a minimum means that law enforcement officers may not conduct "fishing expeditions" on private, posted and fenced property, trespassing thereupon at will for a period of several months until they discover "open fields" containing incriminatory evidence. When conducted on fenced property, such activity is clearly inconsistent with

the aims of a free and open society, and flies in the face of a reasonable, clearly exhibited expectation of privacy. Amsterdam, supra. Individuals in circumstances similar to LoGiudice's would, I believe, expect their privacy to be invaded only upon issuance of a valid search warrant. Moreover, this reasonable expectation of privacy would not unduly hamper legitimate law enforcement and investigative activities, such as verifiable tips from reliable informants, or aerial fly-over searches from appropriate heights. See, e.g., REECE v. STATE, 152 Ga. App. 760 (264 SE2d 258 (1979); PEOPLE v. SNEED, 32 Cal. App. 3d 535, 108 Cal.Rptr. 146 (1973).

Because in this appeal the state has relied solely on the "open fields" exception in its attempts to validate

the warrantless search of appellant's land, I will address other possible justifications for the search only briefly. The state, of course, assumes the burden of proving that an exception to the Fourth Amendment's general warrant requirement applies. U.S. v. JEFFERS, 342 U.S. 48, 51 (72 SC 93, 96 LE 59) (1951); OCGA §17-5-30(b). It is interesting to note that Sheriff Greathouse and the GBI agents surreptitiously entered appellant's land on two occasions, making prolonged observations, before seeking a search warrant. This conduct was in itself a tacit admission that the officers lacked the probable cause necessary to secure a search warrant when they first trespassed on appellant's land.[9] Nor is there any evidence of exigent circumstances, such as possible des-

truction of the marijuana plants, which would excuse the officers' failure to obtain a warrant prior to entering the land. The reports from local citizens concerning heavy equipment operations at night on the land and the laying of water pipe, coupled with an anononymous, uncorroborated tip of illegal activity on the land, does not amount to probable cause to issue a search warrant. Operation of heavy farm machinery, even at night, is commonplace in today's farming world. The reports concerning appellant's water pipes are likewise not indicative of any criminal activity. In addition, there is no evidence in the record that a reliable source ever observed marijuana growing on the land.

It is inconceivable to me that

this court would condone the outrageous, illegal investigative activities carried on by law enforcement officials in this case. To sanction this search is to say that law enforcement officers may freely trespass on fenced, posted, secluded rural property without regard for the privacy of persons under the Fourth Amendment. This view too easily defers to the judgment of officers of the law who are, after all, only human, and are sometimes overzealous in their pursuit of "the often competitive enterprise of ferreting out crime," JOHNSON v. U.S., 333 U.S. 10, 14 (68 SC 367, 92 LE 436) (1948). Such a view also derogates unnecessarily from the importance of the rights and values the Fourth Amendment was designed by the founding fathers to protect--rights just as

important as freedom of religion, of speech and the press, the right to a jury trial and to trial counsel, due process, freedom from quartering soldiers in one's home in peacetime, and the other precious liberties safeguarded by the Bill of Rights.[10] As Justice Brandeis pointed out in his famous dissent in OLMSTEAD v. U.S., 277 U.S. 438 (48 SC 564, 72 LE 944) (1928), the Fourth Amendment guarantees "the right to be left alone - the most comprehensive of rights and the right most valued by civilized men." Id. at 478.

I would therefore reject the per se "open fields" doctrine employed by the Court of Appeals and sanctioned by this court in this and previous cases. Because the seized evidence was observed by officers who were in a place

they had no right to be in violation of appellant's justifiable expectation of privacy, those officers' observations and the seized evidence should have been suppressed. To hold otherwise makes the "open fields" doctrine a carte blanche authorization to law enforcement officers to trample and roam at will over fenced, posted private property outside of the curtilage without a warrant. Where a landowner has demonstrated to outsiders that he intends to shut them out, some degree of constitutionally protected privacy attaches. The protection against illegal searches and seizures accorded by the Fourth Amendment does not vanish where the curtilage line ends.

In conclusion, I can only echo the sentiments of Justice Brennan: "Although I recognize that the traffic

in illicit drugs is a matter of pressing national concern, that cannot excuse this Court from exercising its unflagging duty to strike down official activity that exceeds the confines of the Constitution. In discussing the Fourth Amendment in COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (1971), Justice Stewart stated: 'In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts.' Id., at 455 (plurality opinion). We must not allow our zeal for effective law enforcement to blind us to the peril to our free society that lies in this Court's disre-

gard of the protections afforded by the Fourth Amendment." FLORIDA v. ROYER, U.S. (103 SC 1819, 75 LE2d 229) (1983) (Brennan, J., concurring specially).

I respectfully dissent.

ENDNOTES

1. Clearly Sheriff Greathouse is a "law enforcement officer" to whom the Fourth Amendment applies. See STATE v. YOUNG, 234 Ga. 488, 494 (216 S.E.2d 586)(1975) (Fourth Amendment exclusionary rule applies to "action taken by law enforcement personnel"); OCGA §15-16-1(a) ("the sheriff is the basic law enforcement officer of the several counties of this state ...").

2. If Sheriff Greathouse had the right to be on the land in the first place, he needed no search or arrest warrant. Anyone violating the law in his presence would be subject to arrest and search under the "plain view" doctrine.

3. Harms and Karlovich were tried separately from appellant. See KARLOVICH v. STATE, 165 Ga. App. 761 (297 S.E.2d 499)(1983).

4. Apart from its Fourth Amend-

ment implications, this conduct clearly violated the criminal trespass statute, see OCGA §16-7-21, and constituted a common law trespass, see OCGA §51-9-1.

5. This oft-quoted remark is misleading, and it reflects the dearth of analysis in the Hester opinion. There was, of course, no Fourth Amendment at the common law. In fact, the oppressive treatment persons received in England and in the colonies prior to the Revolution was a leading reason the founding fathers adopted the Bill of Rights. See BOYD v. UNITED STATES, 116 U.S. 616, 623 (6 S.C. 524, 29 L.E. 746)(1886); Note: How Open are the Open Fields?, 14 U.Tol.L.Rev. 133 (1982).

6. Apart from any consideration of the Supreme Court's interpretation of the Fourth Amendment in Hester and subsequent cases, this court is free, under the Georgia Constitution, to provide for greater protection of individual rights than under federal law. See OREGON v. HASS, 420 U.S. 714, 719 (95 S.C. 1215, 43 L.E.2d 570) (1975); Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). See also WHEELER v. STATE _____ S.W.2d _____ (Tex. Ct. Crim. App., decided 9/29/83).

7. The "open fields" doctrine, as interpreted and employed by most courts, does not place proper emphasis on the "personal privacy" component of

the Fourth Amendment recognized in Katz. Instead the doctrine clings to the outmoded "constitutionally protected area" analysis of Olmstead, supra. See UNITED STATES v. OLIVER, 686 F.2d 356, 363 (1982) (Keith, J. dissenting).

8. Certiorari had been granted, however, in UNITED STATES v. OLIVER, 686 F.2d 356 (1982), 51 USLW 3552. That case is currently pending in the Supreme Court.

9. See n.4, supra. It is important to remember that "probable cause" and "reasonable expectation of privacy," while interrelated, are separate and distinct concepts of law. An officer of the state with probable cause, that is, a reasonable belief that a crime has been or is being committed, BRINEGAR v. UNITED STATES, 338 U.S. 160, 175-76 (69 S.C. 1302, 93 L.E. 1879) (1949), may obtain an arrest warrant or a search warrant. Once probable cause has been shown, the individual's expectation of privacy vanishes. The concepts are thus in a sense mutually exclusive ones, and cannot coexist in the same point of time.

10. History shows that the main impetus behind the adoption of the Bill of Rights in 1791 was the protection of individual civil rights from unwarranted governmental intrusion. In congressional debates on the proposed amendments, James Madison stated: "I believe the great mass of

the people who opposed [the Constitution as originally ratified] disliked it because it did not contain effectual provisions against the encroachment on particular rights and those safeguards which they have long been accustomed to have interposed between them and the magistrate who exercises the sovereign power." Annals of Congress, 1st Cong., 1st Sess., p. 450. See also Lasson, The History and Development of the Fourth Amendment 87 (1937).

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IN THE COURT OF APPEALS OF GEORGIA

65277 KARLOVICH v. STATE

65278 HARMS v. STATE

Decided February 24, 1983

Birdsong, Judge.

Stephen M. Karlovich and Tammy R. Harms were each convicted of possession of more than one ounce of marijuana in violation of the Controlled Substances Act and each was sentenced to serve three years. Each brings a separate appeal but enumerates the same error, i.e.,

denial of a motion to suppress evidence based upon an alleged unlawful search and seizure. We have consolidated the two cases as one for the purposes of this appeal. HELD:

The evidence reflects that one Thomas LoGiudice owned several hundred acres in rural Upson County. A great part of this land was heavily forested and obscured by thick, almost impenetrable underbrush. In 1980 the Upson County Sheriff received information that LoGiudice was using heavy equipment to clear part of his land late at night. A water pipe was laid 300 yards into the wooded area and then the contractor was informed that the owner would perform the rest of the work. The sheriff investigated this acreage in 1980 but found nothing irregular. In July 1981, the sheriff and several

deputies again went onto the land and observed a marijuana field under cultivation and numerous plants growing. Harms was seen in the field that day. On the following day the sheriff went back and once again saw Harms, Karlovich and LoGiudice working the field. All were arrested and charged with possession of marijuana.

LoGiudice was tried and convicted and filed a separate appeal. See the affirmance of that conviction in LOGIUDICE v. STATE, 164 Ga. App. 709 (297 S.E.2d 499). Karlovich and Harms were jointly tried without jury and stipulated that all the facts concerning the merits of their case and the search and seizure issue were the same as appeared in the trial of LoGiudice. Those facts are basically as stated above, Karlovich was shown to have no

ownership interest in the property and to have lived some distance away from the property. Harms lived in a house trailer only 35 feet from the marijuana field in controversy. The facts are undisputed that the field was separated by small hills, a thick growth of trees and underbrush and one could only see a portion of the trailer from the wire fence surrounding the field.

As to Karlovich, trial court did not err in denying the motion to suppress. He had no standing to question the search of an open field lying on property owned by another and in whcih he had no proprietary interest. ANDERSON v. STATE, 133 Ga. App. 45, 46 (1) (209 SE2d 665). See also BRISBANE v. STATE, 233 Ga. 339, 345 (211 SE2d 294); CUEVAS v. STATE, 151 Ga. App. 605, 610 (260 SE2d 737).

Neither did the trial court err as to the denial of the motion by Harms. Though the argument was made that by the marijuana was only 35 feet from the trailer occupied by Ms. Harms and thus arguably was within the curtilage of her home, the facts clearly show to the contrary. The field was separated from her residence as surely as from that of LoGiudice (1,700 feet). The curtilage pertains to land used as a part of one's home and therefore is under the same protection afforded the homesite by the Fourth Amendment to the Constitution. It is obvious however from the facts that Ms. Harms did not use the marijuana field as a part of her homesite (i.e., as a vegetable or flower garden, for use of pets or her own recreation). This field was separated from her

trailer and only pat of the trailer was visible from the ten-foot chicken wire fence surrounding the field. In fact the marijuana was not visible to the eye further than ten feet from the field and obversely the inference is reasonably inescapable that one could not see the trailer from within the field. Thus Ms. Harms is faced with the same problem faced by Karlovich. The field was indeed nothing more than that - an open field and not a part of her homesite. She likewise has no standing to controvert the search of an open field owned by another.

Judgment affirmed. McMurray, P.J., and Banke, J., concur.

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IN THE COURT OF APPEALS OF GEORGIA

Decided: November 22, 1982

65263. LoGIUDICE v. THE STATE

Deen, Presiding Judge.

Thomas F. LoGiudice appeals from his conviction of possession of more than an ounce of marijuana with intent to distribute in violation of the Georgia Controlled Substances Act following a trial before a judge.

1. It was not error for the trial court to overrule appellant's motion to suppress. He contends that his fourth amendment rights were violated when the sheriff and GBI agents who were conducting a surveillance of his property for suspected illegal drug activities entered his property on July 6, 1981, through dense woods until they were within ten feet of six and one-half foot chicken wire fence which enclosed a plot of marijuana. This plot was located approximately thirty-five feet from a travel trailer

occupied by one Tammy Harms. The officers observed the field for approximately four to six hours before leaving and observed Ms. Harms fondling the marijuana plants. The next day the officers again entered the land and arrested Ms. Harms, after again observing her in the field and also observed LoGiudice and another man in the field. The sheriff then obtained a search warrant and arrested LoGiudice when it was executed. The officers discovered marijuana growing not only in the half-acre plot near the Kenskill trailer occupied by Harms, but also in an area close to the trailer occupied by LoGiudice and his wife which was located on a lake appoximately 1,700 feet from the plot surrounded by the chicken wire fence. Appellant is apparently relying upon

the arrest of Ms. Harms to support his claim that the search was illegal because of an illegal search of the curtilage of the trailer in which she lived. The evidence, however, shows that while appellant owned the trailer he resided in the trailer near the lake approximately 1,700 feet from the large marijuana patch. He also contends that the agents were trespassing on his property as the land was posted and the gates were locked. The sheriff testified that only after his surveillance of the property did he learn that the property was posted and that the gates on the road leading to the property were locked.

The trial court correctly held that GIDDENS v. STATE, 156 Ga. App. 258 (274 SE2d 595) (1980), was controlling. That case relied upon HESTER

v. UNITED STATES, 265 U.S. 57 (44 SC 445, 68 LE 898) (1923), wherein it was found that a similar trespass did not constitute a search of the defendant's house, person, papers or effects. Here, the sheriff testified that he did not seize any evidence until the search warrant was executed and had no prior notice that entry onto the property was forbidden. As to appellant's argument that the field adjacent to the Kenskill travel trailer was within the curtilage of a dwelling, he could not have any expectation of privacy in a dwelling in which he does not reside, and it is well established that the Fourth Amendment protects people, not places, against unreasonable searches and seizures. In KELLY v. STATE, 146 Ga. App. 179 (245 SE2d 872) (1978), a similar situation arose and

this court found tents adjacent to a marijuana field and occupied by the defendants to be dwellings and the adjacent area to be within the curtilage. Even assuming that Ms. Harms was arrested within the curtilage of her residence and that LoGiudice has standing to complain of a search of the curtilage, the evidence indicated that the marijuana plants could be seen from ten feet outside the chicken wire fence. Moreover, it is possible that the marijuana field was not within the curtilage of Ms. Harms' trailer, as a registered land surveyor testified that the land separating her residence from the field was thickly wooded and rough. In view, of all of the above-mentioned facts, the trial court, as trier of fact on the motion to suppress, did not err in holding

that the motion to suppress was without merit.

2. The trial court did not err in allowing into evidence items seized as a result of the search and certain statements made by appellant subsequent to his arrest. As the trial court found the search to be valid under the warrant, the seized evidence was properly admitted. The court also held a Jackson-Denno hearing and found his statements to have been made voluntarily.

3. The trial court did not abuse its discretion in denying appellant's motion for a continuance of the suppression hearing. PULLIAM v. STATE, 236 Ga. 460 (224 SE2d 8) (1976); DOMINGO v. STATE, 211 Ga. 691 (88 SE2d 1) (1955).

4. In his final enumeration of

error, the appellant claims that the trial court erred in denying his motion for the return of certain firearms seized when his residence was searched, imposing a forfeiture of the weapons to the Upson County Sheriff's department and crediting the appraised value of the weapons ($6,404) against the amount of the $10,000 fine which was imposed as a part of his sentence. We agree with this contention.

There is no evidence that the gun collection was contraband, as required under Code Ann. §27-3101. (Even if it were contraband, the proper method for disposal of such items is set for in Code Ann. §§3102 and 3103 and not the procedure followed in the instant case.) Once it was determined that the guns were not contraband (i.e., because they were not stolen

property or used in the commission of a crime), they should have been immediately returned to the defendant or to some party designated by him to receive his property. The court's reasoning that Code Ann. §26-2914 (a) prevented if from returning the weapons to a person who has been convicted of a felony is true insofar as it goes. However, these weapons did not have to be returned to the appellant. As they were his propery, he must be free to dispose of them as he sees fit once he can no longer be allowed to possess them under the law. He must choose to either give them away or sell them. As there is no law in Georgia which specifies that these guns are contraband, they must be surrendered to the appellant's appointed .gent. See BALKCOM v. HEPTINSTALL, 152

Ga. App. 539 (263 SE2d 275) (1979), wherein it was found that currency seized from a convicted felon who possessed it in violation of prison rules could not be confiscated by prison officials and appropriated to state use. (See Code §77-329.2 for a remedy of the situation in BALKCOM.)

Judgment affirmed in part, reversed in part. Sognier and Pope, JJ., concur.

* *

COURT OF APPEALS OF THE STATE OF GEORGIA

March 14, 1983

The Honorable Court of Appeals met pusuant to adjournment.

The following order was passed:

65277. KARLOVICH v. THE STATE.

65278. HARMS v. THE STATE.

Upon consideration of the motion

for rehearing filed in this case, it is ordered that it be hereby denied. COURT OF APPEALS OF THE STATE OF GEORGIA, Clerk's Office, Atlanta, March 14, 1983.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ALTON HAWK

Clerk

* *

IN THE SUPREME COURT OF GEORGIA

June 8, 1983

Dear Sir:

Case No. 39835. STEPHEN M. KARLOVICH ET-AL v. THE STATE.

The Supreme Court today GRANTED the writ of certiorari in this case.

All the Justices concur, except Marshall, P.J., dissents; Gregory, J. not participating. This case will be assigned to the September, 1983, Oral Argument Calendar.

The Court is particularly concerned with the following: Division 1 of the Court of Appeals' opinion.

Briefs filed in the Court of Appeals are included in the record presented to this court. Additional briefs are not required but may be submitted.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

* *

IN THE SUPREME COURT OF GEORGIA

Decided: November 30, 1983

39835. KARLOVICH et al v. THE STATE

PER CURIAM.

After plenary consideration of

this matter, it is found not to satisfy the criteria for the grant of certiorari and the writ is therefore vacated.

All the Justices concur, except Smith, J., dissenting.

* *

IN THE SUPREME COURT OF GEORGIA

Decided: December 15, 1983

The motion for a rehearing was denied today:

Case No. 39835. KARLOVICH, et al. v. THE STATE.

Smith, J., dissents

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

* *

COURT OF APPEALS OF GEORGIA
433 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450
February 15, 1984

Mr. Bentley C. Adams, III
311 East Main Street
Thomaston, Georgia 30286

Re: 65277. Karlovich v. State
65278. Harms v. State

Dear Mr. Adams:

Pursuant to your request, this is to advise that the remittiturs in the above stated cases are being stayed in this Court pending notification from the U.S. Supreme Court that final judgement has been rendered.

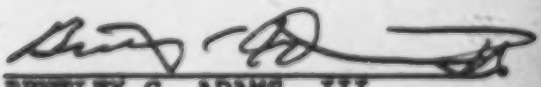
Sincerely yours,

/s/ Alton Hawk
ALTON HAWK

CERTIFICATE OF SERVICE

This is to certify that I have this date served one copy of the within and foregoing Supplemental Appendix upon the Georgia Attorney General, Georgia Department of Law, Room 132, Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334 and upon the District Attorney for the Griffin Judicial Circuit, 2nd Floor, Upson County Courthouse Annex, Thomaston, Georgia 30286 by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This 21st day of February, 1984.



BENTLEY C. ADAMS, III

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Office Supreme Court, U.S.
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MAR 30 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STEPHEN M. KARLOVICH
AND TAMMY R. HARMS,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record
for Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

QUESTIONS PRESENTED

1.

Whether the Court of Appeals of Georgia properly concluded that Petitioner Karlovich did not have standing to challenge the search and seizure as he did not have a reasonable expectation of privacy in the field?

2.

Whether the Court of Appals of Georgia properly concluded that Petitioner Harms did not have standing to challenge the search and seizure as she did not have a reasonable expectation of privacy in the field?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED.	i
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS.	4
REASONS FOR NOT GRANTING THE WRIT.	10
A. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER KARLOVICH LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS HE HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.	10
B. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HARMS LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS SHE HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.	17

CONCLUSION. 36

CERTIFICATE OF SERVICE. 38

TABLE OF AUTHORITIES

Page(s)

Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982) . . 27

Hester v. United States, 265 U.S. 57 (1923) 11, 18, 19, 23, 35

Karlovich v. State, Harms v. State, 165 Ga. App. 761, 302 S.E.2d 396 (1983) 3, 9

Karlovich, et al. v. State, 251 Ga. 698, ___S.E.2d ___ (1983) 3

Katz v. United States, 389 U.S. 347 (1967). . . . . Passim

Maine v. Thornton, ___ U.S. ___ 103 S.Ct. 1520 (1983). . . 29

Oliver v. United States, ___ U.S. ___, 103 S.Ct. 812 (1983) 31

Rakus v. Illinois, 439 U.S. 128 (1978) 14, 26, 35

Rawlings v. Kentucky, 448 U.S. 97 (1980) 13, 20

State v. Brady, 379 So.2d 1294 (Fla. App. 1980). 27

State v. Brady, 406 So.2d 1093 (Fla. 1981) 28

State v. Thornton, 453 A2d 489 (Me. 1982). 31

United States v. Oliver, 657 F.2d 85 (6th Cir. 1981) . . . 32

United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc).33

United States v. Salvucci, 448 U.S. 83 (1980). 12, 20, 21

United States v. Williams, 581 F.2d 451 (5th Cir. 1978). . . 25

NO. 83-1403

IN

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STEPHEN M. KARLOVICH
AND TAMMY R. HARMS,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioners, Steven M. Karlovich and Tammy R. Harms, were indicted and

tried in the Superior Court of Upson County, Georgia. The Petitioners were indicted for the possession of more than one ounce of marijuana with intent to distribute in violation of the Georgia Controlled Substances Act. Prior to trial, a motion to suppress was filed and a hearing was conducted on that motion. After considering the evidence, the trial court denied the motion to suppress. The Petitioners were convicted at a bench trial and sentenced to serve three years imprisonment.

The Petitioners subsequently filed an appeal to the Court of Appeals of Georgia challenging their convictions in the instant case. On appeal, that court addressed the one issue concerning the denial of the motion to

suppress. The court affirmed the trial court's decision as to the motion to suppress. Karlovich v. State, Harms v. State, 165 Ga. App. 761, 302 S.E.2d 396 (1983). The Supreme Court of Georgia granted certiorari on June 8, 1983. On November 30, 1983, the Supreme Court of Georgia found that the case did not satisfy the criteria for the granting of a writ of certiorari and the writ was vacated. Karlovich, et al. v. State, 251 Ga. 698, ___ S.E.2d ___ (1983). The instant petition was then filed in this Court.

STATEMENT OF THE FACTS

In 1979, Thomas LoGuidice purchased a three hundred and forty-five acre tract of rolling, densely wooded land in rural Upson County, Georgia, about eight miles east of the City of Thomaston. In the summer of 1980, Upson County Sheriff Merrill Greathouse received reports that machinery had been heard operating at night on the LoGuidice property. An unidentified source told the sheriff in the fall of that year that LoGuidice had hired a local contractor to dig a well on the land, and had directed the contractor to lay waterpipe from the well to a distance into the woods. Prior to completion of the job, LoGuidice discharged the

contractor and told him that he would finish the job himself.

Sometime in the fall of 1980 the sheriff entered the property for the purpose of searching for marijuana. At that time he was unable to locate any marijuana growing on the property. Later that fall the sheriff conducted an aerial search of the property but could only see the construction of a new fence by LoGuidice around his property. The sheriff had ascertained that the property belonged to LoGuidice through a check of the county property tax records.

On July 6, 1981, acting on information from an unidentified source, the sheriff and a group of G.B.I. agents entered the property to

search for marijuana. After crossing a barbedwire fence and following an old logging road, they discovered an enclosed one-half acre plot of marijuana growing about thirty-five feet from a small travel trailer in which Tammy Harms, LoGuidice's sister-in-law, was living. The trailer belonged to LoGuidice and was connected to the patch of marijuana by a path. The marijuana that was growing in the patch was not visible beyond a distance of ten feet due to a tall chicken wire fence surrounding it. The officers watched the plot for four and one-half to six hours and saw Ms. Harms come onto the enclosure and "fondle" the plants. No arrests were made that day.

On July 7, 1981, the officers returned to the property and arrested Ms. Harms and Steven Karlovich on or near the plot.

The Court of Appeals of Georgia made certain factual findings in addressing the record. The court concluded the following:

> LoGuidice was tried and convicted and filed a separate appeal. See the affirmance of that conviction in LoGuidice v. State, 164 Ga. App. 709, 297 S.E.2d 499 (1983). Karlovich and Harms were jointly tried without a jury and stipulated that all the

facts concerning the merits of their case and the search and seizure issues were the same as appeared in the trial of LoGuidice. Those facts are basically stated above, Karlovich was shown to have no ownership interest in the property and to have lived some distance away from the property. Harms lived in a house trailer only thirty-five feet from the marijuana field in controversy. The facts are undisputed that the field was separated by small

> hills, a thick growth of trees and underbrush and one could see only a portion of the trailer from the wire fence surrounding the field.

Karlovich, supra at 762.

Further facts will be developed as necessary for a more thorough examination of the issues which are presented by this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER KARLOVICH LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS HE HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.

Petitioner Karlovich has urged this Court to grant the instant petition for a writ of certiorari based on the failure of the trial

court to suppress certain evidence. The basis for this request by the Petitioner is an assertion that the decision by this Court in Katz v. United States, 398 U.S. 347 (1967), narrowed the scope of the open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1923), so as to make the challenged search and seizure illegal.

The Petitioner asserts that he does have the necessary standing to challenge the search and seizure as he had a reasonable expectation of privacy under the decision in Katz, supra, such as to necessitate the procurement of a warrant before a valid search of the area could occur. Petitioner Karlovich further asserts that the Court of Appeals of Georgia

has adopted a per se approach to the open fields doctrine which is incompatible with Katz, supra. The Respondent submits that the Court of Appeals of Georgia was correct in determining that Petitioner Karlovich lacked standing to challenge the search and seizure as Karlovich could not have a reasonable expectation of privacy in the area searched as he had no possessory interest therein. The Respondent further submits that, based on the above, the question of the open fields doctrine does not apply to this Petitioner.

This Court has established the guidelines for determining standing to challenge an alleged illegal search and seizure in the cases of United States v. Salvucci, 448 U.S. 83

(1980), and Rawlings v. Kentucky, 448 U.S. 97 (1980). In those cases, this Court has held that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have been violated. The Court went on to hold that legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest. While ownership is a factor to be considered in determining whether an individual's Fourth Amendment Rights have been violated, possession of a seized good may not be used as a substitute for a factual finding that the owner had a legitimate expectation of privacy in the area searched.

The holding of this Court in Rakus v. Illinois, 439 U.S. 128 (1978) further shows that Petitioner Karlovich lacks the necessary standing to challenge the search and seizure in the instant case. This Court in Rakus, supra, held that a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. Further, this Court also held in Rakus, supra, that while legitimate presence on a searched premises is not irrelevant to one's expectation of privacy, it cannot be deemed controlling in determining the validity of a police search. Thus, while Mr. Karlovich may

have legitimiately been on the land owned by Mr. LoGuidice and resided on by Ms. Harms, his mere presence there cannot give him standing to challenge the search and seizure.

Further, in the instant case, Petitioner Karlovich has made no showing that he owned the property seized or that he owned the land on which the marijuana was being grown. The evidence points to the conclusion that Mr. Karlovich was helping Petitioner Harms and Mr. LoGuidice cultivate and grow the marijuana. Thus, it cannot be said that Petitioner Karlovich had a reasonable expectation of privacy in the area searched and therefore, under the guidelines announced by this Court, he lacks standing to challenge the search

and seizure. Therefore, it is clear, that the question of the open fields doctrine does not apply to this Petitioner. This Petitioner has not shown a possessory interest in the land or the marijuana seized, and as his mere presence on the land is not enough to establish an expectation of privacy, it is thus clear that the Petitioner could not have a reasonable expectation of privacy in the area searched. Therefore, as to this Petitioner, this Court should not grant certiorari as the Petitioner lacks the necessary standing to challenge the search and seizure.

B. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HARMS LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS SHE HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.

Petitioner Harms has urged this Court to grant the instant petition for a writ of certiorari based on the failure of the trial court to suppress certain evidence. The basis for this request by the Petitioner is an assertion that the decision by this

Court in Katz v. United States, 389 U.S. 347 (1967), narrowed the scope of the open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1923), such as to make the challenged search and seizure illegal. The Petitioner asserts that she does have standing to challenge the search and seizure as she had a reasonable expectation of privacy in the area searched such as to necessitate the procurement of a warrant before a valid search of the area could occur. Petitioner Harms asserts that the Court of Appeals of Georgia has adopted a per se approach to the open fields doctrine which is incapatable with Katz, supra.

The Respondent submits that the Court of Appeals of Georgia correctly

determined that Petitioner Harms lacked standing to challenge the search and seizure, as it correctly found she could not have a reasonable expectation of privacy in the area searched as she did not own the land on which the search was carried out. The Respondent further submits that assuming arguendo, the Petitioner's presence on the land operated to give her a possessory interest, the Court of Appeals of Georgia properly applied the decisions in Hester, supra, and Katz, supra, and determined that the area searched was outside the curtilage occupied by Petitioner Harms and thus, she could not have an expectation of privacy in that area.

This Court has established the guidelines for determining standing to

challenge an alleged illegal search and seizure in the case of United States v. Salvucci, 448 U.S. 83 (1980) and Rawlings v. Kentucky, 448 U.S. 97 (1980). In those cases, this Court held that a defendant charged with the crime of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have been violated. The Court further held that legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest. While ownership is a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, possession of a seized good may not be used as a substitute for a factual finding that the owner had a

legitimate expectation of privacy in the area searched.

The evidence produced at trial and later concluded as fact by the Court of Appeals was that Petitioner Harms was merely residing on Mr. LoGuidice's property and was cultivating the marijuana field on that property. As this Court stated in Salvucci, supra, legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest. Petitioner Harms has not shown that she did in fact own the area searched. To the contrary, the evidence presented at trial idicated that the land was owned by Mr. LoGuidice. The only basis for Petitioner Harms claiming any expectation of privacy was that she

resided in the trailer located thirty-five feet from the marijuana field.

The Fourth Amendment provides that "the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . ." As was stated by this Court in Katz v. United States, 389 U.S. 347 (1967) "the Fourth Amendment protects people, not places . . . ." Thus, it must be noted that the trailer in which Petitioner Harms was residing was in fact owned by Mr. LoGuidice, as was the field in which the marijuana was found. The Petitioner is thus assuming that residency in the trailer would then entitle her to the protection of the Fourth Amendment for

the field located thirty-five feet from that trailer. Assuming, arguendo, that residency in the trailer owned by Mr. LoGuidice would entitle her to Fourth Amendment protection for that trailer, such protection would not extend to the marijuana field located nearby.

In this Court's opinion in Hester v. United States, 265 U.S. 57 (1923), the Court noted that, "The special protection afforded by the Fourth Amendment to the people and their persons, houses, papers and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Id. at 59. Subsequently, in this Court's decision in Katz v. United States, 389 U.S. 347 (1967),

this Court emphasized that the Fourth Amendment protects people not places. Therefore under Katz there are two requirements that must be met to establish a Fourth Amendment violation. First, a defendant must have exhibited an actual subjective expectation of privacy and secondly, the expectation must be one that society is prepared to recognize as reasonable. Id. at 362.

In a case which construed Katz and the open fields doctrine, the Fifth Circuit Court of Appeals noted that "Although the expectations test has done away with outmoted property concepts no longer satisfactory for Fourth Amendment analysis (cites omitted), a distinction between open fields and curtilage is still helpful

in determining the existence or not of a reasonable privacy expectation." United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978). The court went on to note that it still would hold that the open fields surrounding a house would not be protected under the Fourth Amendment.

In examining the situation in the instant case in light of a determination as to whether certiorari should be granted, this Court should examine the facts of the case and the applicability of the open fields doctrine to those facts. In the instant case, the trial court as the finder of fact obviously found the facts such that the search and seizure of marijuana should be upheld. The Court of Appeals of Georgia further

concluded that Petitioner Harms lacked the standing to complain of the search and seizure as she could have no reasonable expectation of privacy in the field as it was outside the curtilage of her residence. Thus, the Court of Appeals properly applied the standard announced in Katz, supra, and Rakus, supra in determining whether the Petitioner had standing to complain.

The Petitioner has cited several cases which are now pending before this Court in an effort to establish that she did have a reasonable expectation of privacy in the field. However, these cases are sufficiently distinguishable from the facts in the instant case for this Court to conclude that a granting of certiorari

is not warranted in the present case. As each case must turn on its unique facts, it is necessary to examine the underlying factual circumstances behind each case involved.

This Court has granted certiorari in Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982). The factual circumstances in that case involve a forced entry by deputies onto 1800 acres of land which were clearly fenced, locked, occupied and posted. The Florida courts noted that the deputies had to cross a dike, ram through a gate, and cut a chain lock as well as cross several posted fences in order to reach the area in question. See State v. Brady, 379 So.2d 1294 (Fla. App. 1980). The Florida District Court of Appeals

excluded the evidence based on the total encirclement of the property and the "no trespassing" signs that were present. The court concluded that there was clearly an expectation that no one would enter the property.

The Florida Supreme Court also concluded that the search was improper based on the facts of that particular case. The court concluded that there was a clearly demonstrated expectation of privacy and found that under the facts of that case it was reasonable. State v. Brady, 406 So.2d 1093 (Fla. 1981). Therefore, that case presents a circumstance factually distinguishable from the instant case, as Brady exhibited through the numerous fences, gates and signs, a far greater subjective expectation of

privacy than the Petitioner in this case. The Petitioner in the instant case had not taken the same precautions as the defendant in Brady, as the officers stated at the trial of the Petitioner that they were unaware that the property was posted until they were actually leaving the area. Also, it should be noted that the Petitioner in this case is not the actual owner of the land, and there was no evidence presented that this Petitioner took any steps of her own to exclude the public from the area in which she was residing.

This Court has also granted certiorari in Maine v. Thornton, ___ U.S. ___ 103 S.Ct. 1520 (1983). That case involves a similar situation in which officers walked across a

defendant's property between the defendant's mobile home and an adjacent house. The officers followed a road which was being used as a footpath. The marijuana was found growing in a clearing surrounded by chicken wire. It was noted that the area was heavily wooded. The court noted that there had been an old stone wall surrounding the area, as well as an old barbedwire fence and "no trespassing" signs around the perimeter of the property, including the area where the woods road entered the defendant's property. The court based its decision on the fact that this was a secluded location and that there were many efforts made to exclude the public. The court found that these facts evidenced a

reasonable expectation of privacy. State v. Thornton, 453 A2d 489 (Me. 1982). However, in that case, the court granted the motion to suppress and the state requested and was granted a writ of certiorari to appeal. In the instant case, the motion was denied and thus does not warrant any further review on appeal. As was noted above, the defendant in Thornton was the actual owner of the property and had himself taken the steps to evidence his expectation of privacy. The Petitioner in the instant case had taken no such steps.

The third case cited by the Petitioner is Oliver v. United States, ___ U.S. ___, 103 S.Ct. 812 (1983). In that case, detectives drove past the defendant's residence

for approximately three quarters of a mile to a barn. At that point, the detectives were mistaken for hunters and were specifically advised to leave the premises. The officers ignored the warning and continued to cross the property. There was a private road blocked by a locked gate with a "no trespassing" sign posted on the gate. This was the fourth such sign that had been seen by the officers while crossing the farm. Two officers then slipped through a hole in the gate and continued on foot for another quarter of a mile across the farm. United States v. Oliver, 657 F.2d 85 (6th Cir. 1981).

In that case, the panel of the Sixth Circuit initially concluded that the expectation of privacy was

objectively reasonable based on the facts of that case. Subsequently, the Sixth Circuit Court of Appeals considered the case en banc. That court examined the facts of the case in light of Katz v. United States, supra. The court found that the general principles for the Fourth Amendment did not protect an open field of marijuana. The court concluded that the Fourth Amendment would protect a person in a house built in an open field, but not the field itself. Therefore, the en banc decision concluded that there was no Fourth Amendment violation. United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc).

The court in that case clearly concluded that no set of facts would

ever serve to find a reasonable expectation of privacy in an open field. This was not the conclusion of the Court of Appeals of Georgia. The court only found that the field was outside the curtilage of the house, and that therefore, the Petitioner could not have a reasonable expectation of privacy in that field. Again, it should be noted that the Petitioner did not actually own the property searched. Had the field been closer to the residence, the court could have concluded that the Petitioner might have had a reasonable expectation of privacy in the field, but as the field was located some distance from the Petitioner's trailer, and the property on which it was located was owned by another, the

court therefore properly found that the Petitioner had no expectation of privacy in that field.

Respondent submits that the Georgia Court of Appeals properly applied the criteria for determining standing as set forth by this Court in Rakus v. Illinois, supra, and in so deciding, found that no reasonable expectation of privacy existed as defined by Hester v. United States, and Katz v. United States. As the Court of Appeals correctly applied the decisions of this Court, no federal constitutional issue exists which would justify the granting of a writ of certiorari.

CONCLUSION

For all the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of Petitioners, Steven M. Karlovich and Tammy R. Harms.

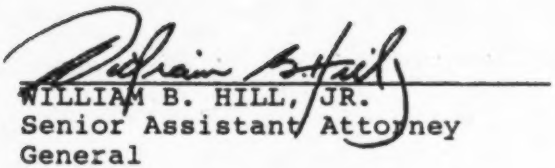
Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

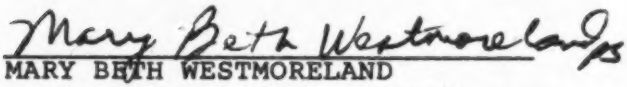
JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

Marion O. Gordon

MARION O. GORDON
First Assistant Attorney
General



WILLIAM B. HILL, JR.
Senior Assistant Attorney
General



MARY BETH WESTMORELAND
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States hereby certify that in accordance with the rules of the Supreme Court of the United States I have this day served three true and correct copies of this Brief for the Respondent in opposition upon the Petitioners' attorney by depositing a copy of this brief in the United States mail with proper address and adequate postage to:

Mr. Bentley C. Adams, III
Attorney at Law
311 East Main Street
Thomaston, Georgia 30286

This 25th day of March, 1984.

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Counsel of Record
for Respondent